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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

THE CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, on behalf of itself, and ANN CUPOLO-FREEMAN, RUTHEE GOLDKORN, and JULIE REISKIN, on behalf of themselves and a proposed class of similarly situated persons,

Plaintiffs,

v.

HOSPITALITY PROPERTIES TRUST,

Defendant.

Case No. 3:15-cv-00221-JST

REPRESENTATIVE PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

The Honorable Jon S. Tigar
Courtroom 9, 19th Floor
Hearing Date: January 14, 2015
Hearing Time: 2:00 p.m.

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REPRESENTATIVE PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

HPT "does not contest in this action that an owner cannot contract away its ADA obligations to a manager and remains jointly and severally liable to disabled plaintiffs." Dkt. No. 64 ("Opp.") 24 n.15. Nor does HPT argue, or provide any evidence, that the hotels it owns provide wheelchair-accessible transportation equivalent to the transportation services they provide to guests without disabilities. It repeats that it does nothing to ensure compliance with the ADA's accessible transportation requirements at its hotels. This is a classic Rule 23(b)(2) case. The Representative Plaintiffs seek one injunction to bring all of HPT's hotels into compliance with the ADA's accessible transportation requirements. HPT's defense to the remedy sought – that it will lose its tax-favored status as a real estate investment trust ("REIT") if it is required to "manage" the hotels – can be resolved on a classwide basis. HPT raises a host of irrelevant arguments aimed at defeating class certification, none of which has merit.

I. BACKGROUND

A. HPT.

HPT admits it does nothing at its hotels to ensure compliance with the ADA's accessible transportation requirements. It produced no evidence of any attempts to enforce compliance-with-law provisions in its management agreements with respect to the ADA's accessible transportation requirements. HPT also admits it "does not provide the Management Companies with any uniform policy or plan regarding the operation of shuttle or transportation services at the hotels." Opp. 3; HPT Ex. 1 ¶ 5.[1] HPT does not decide whether to offer transportation at a particular hotel, Opp. 3, but that is irrelevant. Regardless of who decides to offer transportation at a hotel owned by HPT, if the hotel provides transportation to guests, and its transportation does not comply with the ADA, then HPT is liable. Indeed, HPT "does not contest in this action that an owner cannot contract away its ADA obligations to a manager and remains jointly and severally liable to disabled plaintiffs." Opp. 24 n.15.

[1] "HPT Ex." refers to the exhibits HPT filed in support of its opposition brief. "Ex." refers to the exhibits to the Declaration of Julie Wilensky filed concurrently with this brief.

When confronted with Plaintiffs' evidence that more than 90% of HPT's hotels providing transportation are not in compliance with the ADA, HPT did not rebut the substance of this evidence. It did not contest that these hotels are subject to ADA transportation regulations governing employee training and equivalent accessible transportation services. It did not submit evidence that the transportation services at these 128 hotels were in fact compliant. Nor has HPT asserted that the four HPT hotels called by the Representative Plaintiffs, which Plaintiffs' expert Dr. Quinn also contacted, provide equivalent accessible transportation. Instead, HPT launches a collateral attack on admissibility. As explained in Plaintiffs' opposition to HPT's motion to strike, Dr. Quinn's report is admissible, and it provides persuasive evidence of widespread violations of the ADA at HPT hotels.

B. Plaintiffs' Investigation.

HPT mischaracterizes Plaintiffs' investigation and focuses on immaterial facts. While largely irrelevant to resolving this motion, some mischaracterizations warrant correction.

First, HPT misrepresents the Civil Rights Education and Enforcement Center's ("CREEC") communications about its investigation. It asserts that when CREEC sent an email to members on October 23, 2014 about accessible hotel transportation, no one responded with information that he or she had "difficulty at an HPT hotel." Opp. 4. HPT mischaracterizes the email as "seeking to elicit stories of difficulties with transportation services." Opp. 4; HPT Ex. 7 (Reiskin Depo. Ex. 25) at 174-78. The email, which did not mention HPT or any particular hotels, did not solicit information. It asked recipients if they wanted more information about CREEC's investigation, which "revealed widespread violations" of the ADA's accessible transportation regulations. *See id.* As a legal matter, whether a plaintiff or class member knows which entity is liable for a legal violation is irrelevant. As a factual matter, the ownership structure of hotels is opaque to consumers. CREEC members, like any other consumers, do not know whether a particular hotel they visited or want to visit was, is, or will be owned by HPT. *See, e.g.*, Ex. 1 (CREEC's Supp. Resp. to HPT's Rogs.) at 25, Resp. to Rog. 10[2]; HPT Ex. 5 (Cupolo Freeman

[2] HPT submitted CREEC's July 27, 2015 interrogatory responses rather than CREEC's supplemental responses, served on October 2, 2015. HPT Ex. 9. HPT asserts that Plaintiffs "were

Depo.) 148:5-8 ("I don't know what hotels are owned or operated by HPT"); HPT Ex. 8 (CREEC Depo.) 171:21-172:2 (CREEC members "were not familiar with what HPT meant or what that was"); Ex. 2 (HPT's 10-Q report filed Nov. 9, 2015) at 10 (stating that HPT acquired 11 hotels in the first nine months of 2015). In addition, calls with those who responded to the email revealed, among other things, that a CREEC member – whom Plaintiffs also identified as a potential class member – was deterred from traveling to the Bay Area in 2014 and 2015 after contacting two HPT hotels and learning that the hotels had inaccessible shuttles. Ex. 1 at 32, Resp. to Rog. 10; *id.* at 46, Resp. to Rog. 16.

HPT also attempts to discredit CREEC's investigation by highlighting irrelevant facts. HPT notes that before Plaintiffs filed suit, CREEC's paralegal called hotels to ask about accessible transportation "without even knowing that the hotel called was owned by HPT." Opp. 4. This does not matter. CREEC's investigation and subsequent lawsuits address an industry-wide problem.[3] HPT also notes that the Representative Plaintiffs were directed to call non-compliant hotels. Opp. 5. This is no different from other testing cases. For example, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which involved testing under the Fair Housing Act's prohibition on providing false information about housing availability, the Supreme Court noted "[t]hat the tester may have approached the real estate agent fully expecting that he would receive false information . . . does not negate the simple fact of injury. . . ." 455 U.S. at 374.

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able to identify only 11 individuals who had even ever claimed to stay *within a twenty-mile radius* of an HPT hotel, and not necessarily during the class period starting January 15, 2013." Opp. 29 (citing Resp. to Rog. 18). This misstates the cited response and ignores the supplemental response. The interrogatory asked CREEC to identify CREEC members who, since January 1, 2011, stayed at hotels within a 20-mile radius of the HPT hotels identified in the Complaint. It did not ask for all potential class members who stayed within a 20-mile radius of *any* of HPT's 300-plus hotels. *See* Ex. 1 at 56-57, Resp. to Rog. 18. The original response identified 21 CREEC members, and the supplemental response identified three additional CREEC members, who had communicated with CREEC about hotel transportation shuttles and who stayed at hotels within 20 miles of the 17 hotels identified in the Complaint.

[3] Plaintiffs filed two similar lawsuits in this District against other REITs. JCMS ¶ 10 (Dkt. No. 31) (identifying *CREEC et al. v. Ashford Hospitality Trust*, No. 4:15-cv-00216-DMR, and *CREEC et al. v. RLJ Lodging Trust*, No. 3:15-cv-00224-YGR). Magistrate Judge Ryu granted preliminary approval to a class action settlement in *Ashford*. *See* Pls.' Req. for Jud. Notice. In *RLJ*, a motion for preliminary approval of a class action settlement is pending. *See id.*

II. THE REPRESENTATIVE PLAINTIFFS HAVE STANDING TO SEEK INJUNCTIVE RELIEF

The Ninth Circuit on at least two occasions has emphasized that the "Supreme Court has instructed us to take a broad view of constitutional standing in civil rights cases, especially where, as under the ADA, private enforcement suits are the primary method of obtaining compliance with the Act." *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008) (citation and internal quotation marks omitted); *Chapman v. Pier 1 Imports (U.S.), Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (quoting *Doran*). HPT's reliance on a district court decision – decided before *Doran* and *Chapman* – urging "special diligence and vigilant examination" of standing in light of so-called "abusive ADA litigation" is, at a minimum, misplaced.[4] Opp. 10 (citing *Harris v. Stonecrest Care Auto Ctr., LLC*, 472 F. Supp. 2d 1210, 1215 (S.D. Cal. 2007)). The Representative Plaintiffs have standing to seek injunctive relief.

A. The Representative Plaintiffs Meet Constitutional Standing Requirements for Injunctive Relief.

Article III standing requires an injury-in-fact traceable to the defendant's actions, and that the injury can be redressed by a favorable decision.[5] *Chapman*, 631 F.3d at 946 (citing *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075 (9th Cir. 2004)). To establish standing to seek injunctive relief, a plaintiff must demonstrate a "real and immediate threat of repeated injury" in the future. *Chapman*, 631 F.3d at 946 (citation omitted). HPT asserts that "while tester motives in Title III matters alone may not defeat standing, litigants still must meet their Constitutional Article III burden." Opp. 10. The Representative Plaintiffs have done so here.

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[4] Plaintiffs disagree with the concern in *Harris* of plaintiffs "focus[ing] on obtaining damages rather than pursuing accessibility for disabled individuals," 472 F. Supp. 2d at 1219, but any such speculative concern is not present here, as Plaintiffs seek only declaratory and injunctive relief, and no monetary damages.

[5] HPT refers to "prudential Article III standing requirements," Opp. 9, but Article III standing and prudential standing are distinct. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (noting that "a 'prudential' branch of standing" is a "doctrine not derived from Article III"). Prudential standing primarily concerns whether a statutory cause of action extends to a plaintiff in a particular case. *Id.* at 1387-88. HPT does not argue that the ADA's private right of action under title III does not extend to Plaintiffs.

The Representative Plaintiffs satisfy the requirements for standing: "an ADA plaintiff can establish standing to sue for injunctive relief either by demonstrating deterrence, or by demonstrating injury-in-fact coupled with an intent to return to a noncompliant facility." *Chapman*, 631 F.3d at 944. The Ninth Circuit further explained:

> Demonstrating an intent to return to a noncompliant accommodation is but one way for an injured plaintiff to establish Article III standing to pursue injunctive relief. A disabled individual also suffers a cognizable injury if he is deterred from visiting a noncompliant public accommodation because he has encountered barriers related to his disability there.

Id. at 949. Here, the Representative Plaintiffs called HPT hotels and learned that the hotels provide inaccessible transportation, but do not provide equivalent accessible transportation.[6] Dr. Quinn confirmed that these hotels do not provide equivalent accessible transportation. The Representative Plaintiffs were deterred from patronizing these hotels. Dkt. No. 60 ("Mot.") 11.

HPT emphasizes that the Representative Plaintiffs did not go to the HPT hotels they called. This assertion ignores that once the Representative Plaintiffs learned that the hotels they

[6] HPT objects to portions of the Representative Plaintiffs' declarations regarding calls to hotels. *See* Opp. 29-32. HPT does not object to the portions stating that the Named Plaintiffs called the hotels. HPT also does not object to the sentence in Ms. Goldkorn's declaration, "I asked if the hotel has wheelchair-accessible shuttle services and was told that it does not." Opp. 30. But it objects to "I was told that the hotel could request a local wheelchair-accessible taxi for a guest requiring accessible transportation, but that the guest has to pay for a taxi." *Id.* The Court should overrule the objections to the portions about what the Representative Plaintiffs were told.

The hotel employees' statements are not hearsay. They show violations of the ADA regardless of whether the statements are true. If the hotel employees were correct that the hotels do not have equivalent accessible services, the transportation services are not compliant. If the hotel employees were incorrect, and the hotels actually have equivalent accessible services, then providing incorrect information shows a violation of the ADA's training requirement. The statements are also within the state of mind exception under Rule 803(3). They are being offered to show the hotel employees' lack of knowledge and the Representative Plaintiffs' belief that the transportation services offered are not equivalent. Fed. R. Evid. 803(3). The Court should also overrule HPT's Rule 901(a) objections. HPT does not contest that the Representative Plaintiffs called the hotels. It only objects to the statements about what the hotel employees said, which are admissible. Even if the Court determines that the statements are inadmissible hearsay, evidence in support of class certification need not be in a form admissible at trial. *Faulk v. Sears Roebuck & Co.*, No. 11-CV-02159 YGR, 2013 WL 1703378, at *6 n.5 (N.D. Cal. Apr. 19, 2013).

The Court should also overrule HPT's objections to what Ms. Cupolo Freeman and Ms. Goldkorn "later learned" about websites of third-party transportation providers. Opp. 30. These statements are offered to show a belief regarding the third-party providers' services, not to prove what the websites say.

called do not provide accessible transportation, they were not required to make the futile gesture of staying at the hotel and experiencing the lack of equivalent accessible transportation. *See* Mot. 11 n.7 (citing *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1136 (9th Cir. 2002)); *see also D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1037 (9th Cir. 2008) ("We have explicitly *not* required ADA plaintiffs to engage in the 'futile gesture' of visiting or returning to an inaccessible place of public accommodation in order to satisfy the standing requirement."); *Chapman*, 631 F.3d at 950 ("[N]othing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.") (quoting 42 U.S.C. § 12188(a)(1)). Each Representative Plaintiff called at least one HPT hotel with the intent of staying at the hotel if it had equivalent accessible transportation. This is a cognizable injury under the ADA. *Pickern*, 293 F.3d at 1138 ("[A] disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA has suffered 'actual injury.'"). The Representative Plaintiffs are not required to visit the HPT hotels they know do not provide equivalent accessible transportation.

This Court should disregard HPT's attempt to undermine the Representative Plaintiffs' standing by relying on its own noncompliance. HPT asserts that: "if any of the Plaintiffs do choose to visit in the future, it will be at a time when there will be no 'real, immediate threat of repeated injury' because they will only return once and will not experience injury on that occasion because the hotels will have accessible shuttle services." Opp. 13. This is not the law. The Ninth Circuit has found the threat of injury "sufficiently 'imminent'" when a plaintiff will not return to the inaccessible facility "while the barriers remain[]."[7] *Chapman*, 631 F.3d at 950 (analyzing *Pickern*, 293 F.3d at 1138). HPT has produced no evidence contradicting the Representative Plaintiffs' calls (and Dr. Quinn's subsequent calls to the same hotels) or suggesting that the HPT hotels previously contacted by Plaintiffs now have, or will ever have, equivalent accessible transportation.

[7] HPT also misconstrues "repeated injury" language in *Chapman*. Opp. 13. HPT's ongoing noncompliance and resulting deterrence is the repeated injury.

In addition, the Representative Plaintiffs do not know precisely when they will visit the HPT hotels they called, because they do not know when those hotels' transportation services will comply with the ADA. *See, e.g.*, Ex. 3 (Goldkorn Depo.) 171:24-7, 172:23-25. All will stay at the HPT hotels they called once they learn that the hotels they called actually have equivalent accessible transportation services. *See, e.g.*, Dkt. No. 56-3 ("Goldkorn Decl.") ¶ 12; Dkt. No. 56-4 ("Cupolo Freeman Decl.") ¶ 13; Dkt. No. 56-3 ("Reiskin Decl.") ¶ 14; *see also* HPT Ex. 5 (Cupolo Freeman Depo.) 147:19-148:4 (stating that she would go to the Sunnyvale Country Inn & Suites "as a tester and request to use the shuttle service" within 45 days of learning that the hotel has accessible shuttle services). Being deterred by noncompliance and waiting for the defendant to comply with the law – which is outside the Representative Plaintiffs' control – is different from when a plaintiff "alleges *only* an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992) (emphasis added).

B. HPT's Arguments Regarding Tester Standing Are Unpersuasive.

HPT's attempts to distinguish the tester standing cases are unpersuasive. HPT attempts to dispose of *Smith v. Pacific Properties and Development Corp.*, 358 F. 3d 1097 (9th Cir. 2004), in a footnote, stating only that "[t]he enforcement provisions of both the Fair Housing Act and Title II of the ADA on which Plaintiffs rely provide for broader standing than the Title III provisions at issue here." Opp. 9 n.4. But the language of the FHA enforcement provision on which the Ninth Circuit based its decision in *Smith* – that "any person" subjected to disability discrimination may bring suit – is identical to the language of the enforcement provisions in title II and title III of the ADA. *Smith*, 358 F.3d at 1102; *Tandy v. City of Wichita*, 380 F.3d 1277, 1286-87 (10th Cir. 2004); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323 (11th Cir. 2013); *Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1211-12 (10th Cir. 2014). As the Ninth Circuit concluded in *Smith*, "[w]e refuse to accept the notion that Congress could somehow have intended different standing requirements for identical provisions." 358 F.3d at 1103.

HPT contends that the plaintiffs in tester standing cases "had some level of patronage of, and connection to, the public accommodation." Opp. 10. Some had such a connection, others did not. The holdings in these cases do not require a particular level of connection or patronage apart from the testing. For example, in *Tandy*, the only history that one plaintiff, Mr. Goupil, had in using the bus service was a single test in March 2001. 380 F.3d at 1282. The court noted that Mr. Goupil "does not intend to use [the defendant's] buses for personal transportation," but "will 'test' [the defendant's] bus system 'several times per year' starting in May 2002." *Id.* at 1285. As in *Havens*, Mr. Goupil's "sole purpose" was "to determine whether defendant engaged in unlawful practices."[8] *Id.* Accordingly, it was enough that Mr. Goupil tested the services once, and stated that, starting more than a year after his original test, he would test the services again several times per year. Here, the Representative Plaintiffs have made follow-up testing calls to the same HPT hotels and have submitted declarations that they will stay at the hotels as testers and use the shuttle service if they learn that the hotels offer equivalent accessible transportation.

Here, the Representative Plaintiffs, who agreed to serve as testers and have called at least one HPT hotel on at least one occasion, have made clear they will visit at least one HPT hotel, as testers, if they learn that accessible transportation services are provided (and are accurately informed of this). *See* Goldkorn Decl. ¶ 12; Cupolo Freeman Decl. ¶ 13; Reiskin Decl. ¶ 14; HPT Ex. 5 (Cupolo Freeman Depo.) 147:19-148:4. Unlike the claims in *Harris*, the Representative Plaintiffs' intent to test is not speculative. HPT has not rebutted the Representative Plaintiffs' assertion that they will patronize the hotels *as testers*. Rather, HPT argues that being a tester without an "organic" motive is insufficient.[9] This Court should hold, consistent with the weight of authority, that the Representative Plaintiffs have standing.

[8] Similarly, in *Smith*, the Ninth Circuit held that people with disabilities seeking to enforce rights under the FHA were not required to "have an interest in actually purchasing or renting a particular property or dwelling." 358 F.3d at 1099.

[9] HPT cites "four factors" in *D'Lil* as the Ninth Circuit "test" for whether a plaintiff seeking injunctive relief establishes a specific likelihood of return. Opp. 12. *D'Lil* did not involve a tester plaintiff or establish a new four-factor test. It applied the existing framework to the record in that case. The court reversed the district court's determination that the plaintiff lacked standing after the district court *sua sponte* held an evidentiary hearing solely on the plaintiff's intent to return. 538 F.3d at 1034-1035, 1041. The Ninth Circuit noted that "where, as here, the public

C. HPT Conflates Standing with the Requirements of Rule 23.

HPT asserts without citation that if the Representative Plaintiffs have standing to seek injunctive relief at the one or two hotels that each called, "that does not mean they have standing to sue any other hotels." Opp. 15. This ignores a fundamental principle of class actions. As the Ninth Circuit has held, "although in a class-action lawsuit, as in any other suit, 'the remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established,' the 'plaintiff' has been broadened to include the class as a whole, and no longer simply those named in the complaint." *Armstrong v. Davis*, 275 F.3d 849, 871 (9th Cir. 2001) (citations omitted), *abrogated in part on other grounds by Johnson v. California*, 543 U.S. 499 (2005). Similarly, in *Colorado Cross Disability Coalition*, the Tenth Circuit rejected the defendant's argument that the named plaintiff "lack[ed] standing to bring a claim for nationwide injunctive relief because she does not intend to visit . . . over 230 stores nationwide." 765 F.3d at 1212. As is the case here, the plaintiff did not seek a nationwide injunction "in her own right" – she sought it as a representative of a proposed class. *Id.* The court noted that "the question whether nationwide injunctive relief may issue was more appropriately answered by asking whether a class seeking that relief should be certified" – that is, "by application of Rule 23." *Id.* at 1212 n.4, 1214.

III. PLAINTIFFS HAVE ESTABLISHED THAT CLASS CERTIFICATION IS APPROPRIATE

A. This Is a Classic Rule 23(b)(2) Case Seeking a Single Injunction to Remedy HPT's Inaction.

Plaintiffs seek a single injunction providing classwide relief to remedy HPT's failure to act on grounds that apply generally to the class.[10] This is a paradigmatic Rule 23(b)(2) case. As

accommodation being sued is far from the plaintiff's home, we have found actual or imminent injury sufficient to establish standing where a plaintiff demonstrates an intent to return to the geographic area where the accommodation is located and a desire to visit the accommodation if it were made accessible." *Id.* at 1037. For the plaintiff in *D'Lil*, then, "to show the actual and imminent nature of her injury . . . D'Lil must demonstrate her intent to return to the Santa Barbara area and, upon her return, her desire to stay at the Best Western Encina if it is made accessible." *Id.* at 1037. This is the standard, which the Representative Plaintiffs meet.

[10] The arguments supporting certification under Rule 23(b)(2) also support commonality under Rule 23(a)(2). HPT's failure to act to ensure compliance with the ADA is common to all HPT hotels, not just the four hotels directly called by the Representative Plaintiffs.

the Supreme Court recognized in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture." 131 S. Ct. at 2557 (citation omitted); Newberg on Class Actions § 4:26 (5th ed.) ("The rule makers who re-drafted Rule 23 in 1966 designed Rule 23(b)(2) specifically for cases stemming from the civil rights movement").

1. HPT Has Refused to Act on Grounds That Apply Generally to the Class, and the Harm Can Be Remedied in a Single Injunction.

HPT argues that an "unspecified 'practice' of noncompliance" is insufficient because "HPT has demonstrated that no such uniform practice or policy exists." Opp. 16. But this situation fits precisely into Rule 23(b)(2), because HPT has "refused to act on grounds that apply generally to the class . . . ." Fed. R. Civ. P. 23(b)(2). Courts routinely certify Rule 23(b)(2) classes where defendants fail to implement uniform policies or practices to comply with the law, even though the specific legal violations may be manifested in different ways with respect to different class members or locations.[11] Since HPT has not taken any systemwide action to ensure compliance with the ADA's transportation requirements at its hotels, an individualized analysis of the specific ways each hotel fails to comply with the ADA is unnecessary.

For example, in *Gray v. Golden Gate National Recreation Area*, 279 F.R.D. 501 (N.D. Cal. 2011), *reconsideration denied*, 866 F. Supp. 2d 1129 (N.D. Cal. 2011), the court certified – after *Dukes* – a Rule 23(b)(2) class where the plaintiffs alleged the defendant had inadequate or nonexistent systemwide polices regarding access for people with mobility or vision disabilities at the Golden Gate National Recreation Area. *See Gray*, 279 F.R.D. at 520-22. In discussing Rule 23(b)(2), the court noted "a complete absence of a written policy for the accessibility review" and "a pattern of planning, development, and construction" that did not meet accessibility guidelines. *Id.* at 522 (internal quotation marks omitted). The court concluded that "[s]uch deficiencies, if

[11] *See also* Rules Advisory Committee Notes to 1966 Amendments to Rule 23 ("Action or inaction is directed to a class within the meaning of [Rule 23(b)(2)] even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.").

proven at trial, might conceivably be remedied by an injunction that required such a written policy and training on its implementation . . . ." *Id.*

Gray also rejected the defendants' arguments that all of the barriers "would have to be examined and remediated one by one" or that thousands of injunctions would have to be issued.[12] *Id.* at 511, 520-21; *see Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 345 (N.D. Cal. 2008) ("*CDR*") (noting that "courts regularly order the remediation of discriminatory practices in class actions without presiding over the details of the application of such remediation to each and every affected facility or individual"); *Shields v. Walt Disney Parks & Resorts US, Inc.*, 279 F.R.D. 529, 558-59 (C.D. Cal. 2011).

Courts have certified Rule 23(b)(2) classes in many contexts involving defendants' failure to have effective systemwide policies, and have rejected arguments similar to HPT's that many different injunctions would be required to remedy the harm. In *Hernandez v. County of Monterey*, 305 F.R.D. 132 (N.D. Cal. 2015), the court certified a Rule 23(b)(2) class in an 8th Amendment case involving medical care for prisoners. The plaintiffs challenged inadequate policies, including a lack of policies to comply with legal requirements, as well as the failure to have effective policies in place. 305 F.R.D. at 155-58. The court rejected the argument that each class member needed an individualized remedy, and concluded that the plaintiffs' injuries could be remedied "by uniform changes in [jail] policy and practice." *Id.* at 164 (quoting *Parsons v. Ryan*, 754 F.3d 657, 689 (9th Cir. 2014)). For example, although each prisoner's specific medical issues were different, all were "placed at risk of harm by [the jail's] policy and practice of failing to employ enough doctors." 305 F.R.D at 164 (quoting *Parsons*, 754 F.3d at 689). Similarly, in *Dunakin v. Quigley*, 99 F. Supp. 3d 1297 (W.D. Wash. 2015), the court certified a Rule 23(b)(2) class when the plaintiffs, who alleged that a nursing facility failed to provide required screenings, services, and notices to individuals with developmental disabilities, sought an order requiring defendants to

[12] *Gray* also distinguished *Castaneda v. Burger King Corp.*, 264 F.R.D. 557 (N.D. Cal. 2009), where Rule 23(b)(2) was found inappropriate because the damage claims for $5 million predominated over the injunctive relief sought. *Gray*, 279 F.R.D. at 511-12. This case is also different from *Castaneda* because it concerns only one type of barrier: inequivalent accessible transportation.

"develop a system of evaluation and implementation of corresponding services that complies with federal standards." 99 F. Supp. 3d at 1333 (citation omitted). The court rejected the defendants' argument that the plaintiffs sought "separate determinations concerning the individual services that are appropriate for each class member." *Id.* While each class member had different needs, certification under Rule 23(b)(2) was appropriate because the plaintiffs sought the "implementation of appropriate policies, practices, and procedures by Defendants" to ensure compliance with the law. *Id.*

HPT's lack of a uniform policy or practice to ensure compliance with the ADA's accessible transportation requirements at its hotels causes harm to the class as a whole, regardless of differences in the specific transportation services offered at any particular hotel. HPT's systemwide inaction is what Rule 23(b)(2) is meant to address.

2. HPT's Arguments About its Tax-Favored REIT Status Support Class Certification Under Rule 23(b)(2).

HPT's arguments regarding its tax-favored status as a REIT status strongly support class certification under Rule 23(b)(2) (as well as commonality under Rule 23(a)). If HPT prevails in these arguments, it will do so with respect to all of its hotels, not just the four hotels directly called by the Representative Plaintiffs. In any event, it will not be "unlawful" for this Court to issue an injunction requiring HPT to comply with the ADA at its properties.

a. No Authority Limits This Court From Ordering HPT to Require Operational Changes and Training at All HPT Hotels.

HPT contends that although it owns the hotels and is subject to the ADA's requirements for property owners, there is somehow a limitation on those requirements – or the Court's power to issue or require compliance with an injunction – because HPT does not "control" the hotels. Opp. 17.

First, no authority limits this Court from issuing an injunction requiring HPT to implement a uniform policy of training and operational changes at its hotels to comply with the ADA's accessible transportation requirements. An injunction could take several forms, but the

particular actions HPT might be required to take depend on the content and scope of any injunction ultimately issued, not the Court's power to issue and require compliance with an injunction.[13] Nothing in the REIT statute provides an exemption from the ADA. If this Court ultimately issues an injunction requiring HPT to act in a way inconsistent with its REIT status, the consequence will be that HPT fails to qualify as a REIT. The possibility of losing a favorable tax status is not a defense to liability under the ADA. If HPT fails to qualify as a REIT, it will be taxed as a C corporation. Ex. 4 (HPT's 2014 10-K) at PLTFS001825. As HPT explains to its shareholders, "no assurance can be given by [HPT's counsel] or us that we will qualify as or be taxed as a REIT for any particular year." *Id.* at PLTFS001823.

Second, Plaintiffs are unaware of any court that has limited ADA requirements for a property owner. In *Botosan v. Paul McNally Realty*, 216 F.3d 827 (9th Cir. 2000), the Ninth Circuit rejected the argument that a landlord could contract away ADA liability to a tenant. It noted that "a landlord has an independent obligation to comply with the ADA that may not be eliminated by contract," and that "[a] landlord who is aware of its liability for any ADA violations found on its premises has a strong incentive to monitor compliance on its property." 216 F.3d at 833, 834. HPT attempts to significantly expand the holding of *Kohler v. Bed Bath & Beyond of California, LLC*, 780 F.3d 1260 (9th Cir. 2015), but that case limited the liability of a tenant, not a property owner, for ADA violations on portions of property that the tenant did not control. *See* 780 F.3d at 1263-65. Nothing in *Kohler* affected the liability of a property owner, as "the landlord's preexisting obligations to the entire property continue unaffected." *See id.* at 1264. Here, HPT appears to urge this Court to do the opposite of what the Ninth Circuit did in *Kohler* –

[13] HPT contends certification is inappropriate because Plaintiffs have not sufficiently described an injunction that complies with Rule 65(d). Opp. 16. Rule 23 instructs courts to determine whether to certify a class "[a]t an early practicable time." Fed. R. Civ. P. 23(c)(1)(A). At this stage, the Court must decide whether the claims for injunctive relief *can be resolved* on a classwide basis. *See, e.g.*, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011). HPT relies on a Tenth Circuit case from 2011, but the Ninth Circuit subsequently rejected the same argument that plaintiffs were required at the class certification stage "to offer a fairly detailed description of the injunctive relief that they seek." *Parsons*, 754 F.3d at 689 n.35; *see Gray*, 279 F.R.D. at 521. To the extent more might be required at this stage, Plaintiffs already submitted in discovery, based on information known at that time, the general parameters of the injunctive relief sought. Ex. 1 at 34, Resp. to Rog. 12.

to limit the liability of a property *owner* on portions of its property controlled by a tenant. Nothing in *Kohler* prohibits a court from requiring a property owner to remedy ADA violations on property controlled by a tenant.

b. The Court Can, at a Minimum, Issue a Classwide Injunction Requiring HPT to Purchase Accessible Vans for its Hotels.

If the Court ultimately decides that it cannot or will not issue an injunction requiring HPT to undertake certain actions at its hotels that would affect its REIT status, it can still, at a minimum, issue a single classwide injunction requiring HPT to purchase accessible vans for use at its hotels. HPT's statements in SEC filings make clear that HPT can make capital expenditures at its properties to comply with the ADA without running afoul of the REIT provisions.[14] *See also* 26 C.F.R. § 1.856-4(b)(5)(ii) (stating that "[t]he trustees or directors may also make capital expenditures with respect to the trust's property"). HPT concedes it can buy wheelchair-accessible vans for use at its hotels. *See* Opp. 17-18. It contends, however, that if this Court issues an injunction requiring it to buy accessible vans, it "could do nothing to require the individual hotels to use the vans." Opp. 18. Whether HPT can require a hotel to use a lift-equipped van is a challenge to the content and scope of a potential injunction, not the court's power to issue an injunction.[15] Again, this argument applies equally to an injunction covering all of HPT's hotels or only the four hotels called directly by the Representative Plaintiffs.

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[14] HPT states, for example:

> Under the Americans with Disability[sic] Act places of public accommodation and/or commercial facilities must meet federal requirements related to access and use by disabled persons. We may be required to make substantial capital expenditures at our properties to comply with this law. . . .

Ex. 4 at PLTFS001857. HPT also requires its tenants to make payments intended for HPT's capital expenditures. *Id.* at PLTFS001876.

[15] For the three hotels identified by HPT as having accessible vans, Dr. Quinn concluded that the transportation provided to guests who use wheelchairs or scooters was equivalent to the transportation provided to guests without disabilities. Dkt. No. 59-1 ("Quinn Decl.") Ex. A at PLTFS2773-75; Dkt. No. 58-1 at 35-49, HPT's Resp. to CREEC's Rog. No. 5 (identifying Wyndham Irvine Orange County Airport, Kauai Marriott Resort and Beach Club, and Crowne Plaza Miami International Airport).

B. The Proposed Class Meets the Requirements of Rule 23(a).

The proposed class meets the requirements of Rule 23(a). As set forth below, HPT's arguments about numerosity, commonality, and ascertainability are without merit.[16]

1. The Proposed Class Satisfies Rule 23(a)(1)'s Numerosity Requirement.

Numerosity does not require a plaintiff to establish the exact number of people in the class. *Bates v. United Parcel Serv.*, 204 F.R.D. 440, 444 (N.D. Cal. 2001). Courts "regularly rely" on census data in making numerosity determinations and make assumptions based on "common sense" and extrapolation from statistical data. *CDR*, 249 F.R.D. at 347; *see Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994); *Colo. Cross Disability Coal.*, 765 F.3d at 1215; *see also Gray*, 279 F.R.D. at 508 (finding numerosity satisfied based on evidence of the percentage of the population that has vision or mobility impairments and the number of people visiting the defendant parks each year). In addition, in cases "involving alleged violations of the ADA, where the alleged violations may have deterred putative class members from attempting to access" the facilities at issue, courts have rejected defendants' arguments asserting Rule 23 requires specific evidence about numerosity that "may be unavailable, if not impossible, to obtain." *Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1999-1200 (N.D. Cal. 2007). In *National Federation of the Blind*, the court rejected the defendant's argument that plaintiffs did not establish numerosity because they had not submitted evidence of the number of blind people who use the internet and how many of those had attempted to access Target.com. *Id.* at 1199 (noting that the "defendant seeks to impose a level of specificity not required by Rule 23(a)").

HPT argues that the class is not numerous because HPT's hotel rooms are only a small number of all hotel rooms in the United States. Opp. 18-19. But the relevant question is not what percentage of the market HPT occupies, but whether there are enough people who use wheelchairs who were denied access to or deterred from using the transportation services at HPT's hotels, or who will be denied access to or deterred from using the transportation services

[16] HPT does not challenge the representative parties' adequacy under 23(a)(4). Nor does it challenge the appointment of Plaintiffs' Counsel as class counsel under 23(g).

due to inaccessibility, such that joinder of all members in this lawsuit would be impracticable. Fed. R. Civ. P. 23(a)(1). Using common sense and census data, as the courts in this district have done when evaluating ADA classes seeking certification under Rule 23(b)(2), it is not a stretch to conclude that of the 3.6 million people who use wheelchairs, the class is sufficiently numerous.[17]

HPT attempts to discount that approximately 250 people *each year* request accessible transportation at a single HPT hotel, the Residence Inn Chicago Downtown/Magnificent Mile, because that hotel provides shuttle service to hospitals. Opp. 18 n.10. For assessing numerosity, the type of destination does not matter, and HPT owns at least 3 other hotels that provide transportation to medical centers or hospitals. Quinn Decl. Ex. A at PLTFS002772, 2793.

HPT also ignores Plaintiffs' arguments regarding the non-numerical factors that weigh heavily in support of numerosity here, including that the class is geographically dispersed (HPT hotels providing transportation to guests are located in 29 states), that class members are difficult to identify, and that the class includes future class members. Mot. 18.

2. The Proposed Class Satisfies Rule 23(a)(2)'s Commonality Requirement.

HPT notes that for commonality, there must be cause to believe that *all of* [the class members'] *claims can productively be litigated at once*." Opp. 21 (quoting *Dukes*, 131 S. Ct. at

[17] Under Civil Local Rule 7-4, Plaintiffs object to paragraphs 15-19 of Dr. Michael Salve's Declaration. HPT Ex. 3. The Court should exclude these paragraphs on numerosity because they are new information required to be disclosed under Rule 26. Dr. Salve is a rebuttal expert. As such, he is permitted "solely to contradict or rebut evidence on the same subject matter identified by another party." Fed. R. Civ. P. 26(a)(2)(D). Dr. Quinn, Plaintiffs' expert, did not opine on numerosity. As the rebuttal expert, Dr. Salve cannot opine on it. Indeed, HPT's rebuttal expert disclosure, and Dr. Salve's rebuttal report, do not address numerosity. Ex. 5 (HPT's Class Cert. Rebuttal Expert Witness Disclosure). It is improper for Dr. Salve to opine on this now. All the information Dr. Salve newly introduces was previously available. He is not correcting inaccuracies as permitted by Rule 26(e), but asserting new opinions.

If the Court does not strike these paragraphs, it should give them no weight. Plaintiffs do not assert that all 3.6 million people who use wheelchairs have stayed at or will stay at an HPT hotel. Dr. Salve's "socioeconomic factors" are unconvincing. That a "typical guest" for a "business hotel stay" in 2011 was "1 male adult" has nothing to do with the size of the potential class. HPT Ex. 3 ¶ 19. That many wheelchair users may be younger than 21 or older than 64 also has no bearing on the number of class members. *Id.* ¶ 17. Even assuming the truth of Dr. Salve's assertion that many wheelchair users in a certain age bracket have a household income far below that of the "typical guest" for a "business hotel stay," this does not refute that 15 wheelchair users *each year* may have sufficient money to stay at an HPT hotel.

2551 (emphasis added)). Here, it makes sense to litigate all class members' claims for injunctive relief – and HPT's defenses – at all HPT hotels in one action.

a. This Case Presents Common Questions Capable of Classwide Resolution.

An overarching common, classwide question that HPT cannot escape is liability: *is* HPT liable if the transportation services at its hotels – which HPT does not manage – do not comply with the ADA? While HPT appears not to contest its liability for violations of the ADA at its hotels, Opp. 24 n.15, that this question has been answered in the affirmative does not destroy its common nature. Whether HPT is liable if the transportation at one, some, or all of its hotels is out of compliance with the ADA is a question for which the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551. Indeed, "[e]ven a single common question will do." *Id.* at 2556 (quotations omitted); *see Ellis*, 657 F.3d at 981 ("The requirements of Rule 23(a)(2) have 'been construed permissively,' and '[a]ll questions of fact and law need not be common to satisfy the rule.'") (citation omitted).

Plaintiffs have raised other common questions that can be resolved classwide, including whether HPT's REIT arguments are "a defense to claims brought under the ADA." Mot. 19. HPT concedes these questions are "common" but argues they "have no effect on the validity of the class members' claims or HPT's defenses to those claims." Opp. 24 n.16. HPT's reliance on *Kohler*, however, appears to be an argument on the merits that because HPT cannot manage or control the hotels, (1) this Court cannot require HPT to take certain actions to ensure ADA compliance at its properties, or (2) HPT cannot comply with the terms of such an injunction. HPT characterizes these arguments as a defense to class certification, not the ADA claims, Opp. 24, but whether HPT can be required to act to remedy ADA violations at its properties is a question the Court has not yet resolved. Courts have held that a common defense satisfies Rule 23(a)'s commonality requirement.[18] HPT's arguments that it cannot be made to remedy ADA violations

[18] *See, e.g., del Campo v. Am. Corrective Counseling Servs., Inc.*, 254 F.R.D. 585, 592 (N.D. Cal. 2008) (finding commonality satisfied where "[d]efendants are asserting a common

at its properties are not specific to the claims of the Representative Plaintiffs or any particular HPT hotel. The questions can and should be resolved classwide.

b. HPT Misconstrues the Application of the Accessible Transportation Regulations.

HPT misconstrues the application of the accessible transportation regulations. It argues that determining compliance with the regulations involves "over a dozen, fact-specific, individualized inquiries and balancing tests that destroy any commonality." Opp. 22-23. This is not the case. First, the "threshold determination of whether a hotel must provide a lift-equipped vehicle" is straightforward – HPT identified in discovery the seating capacity of the relevant vehicles and whether the vehicles operate on a "fixed route" or are "demand responsive." Dkt. 58-1 at 13-34, Resp. to Rogs. 2 & 4. Second, HPT misreads the "equivalent services" requirements. If one service characteristic is inequivalent, the services are inequivalent. 49 C.F.R. § 37.105. For example, if a hotel provides transportation services to guests seven days per week and relies on a third party that is only available on weekdays to provide accessible transportation services, then the accessible transportation services are not equivalent under the regulations. As demonstrated by Dr. Quinn's report, this is a straightforward inquiry that can be easily determined.

c. HPT's Attempts to Sidestep Plaintiffs' "Significant Proof" of Systemwide Discrimination Fail.

HPT makes several overlapping arguments to sidestep Plaintiffs' "significant proof" of a general policy or practice of discrimination. None is persuasive.

First, Plaintiffs have done far more than merely "*allege* a systemwide practice of discrimination." Opp. 26. While the Court need not make a finding on the merits now, Plaintiffs have submitted evidence of noncompliance at more than 90% of HPT's hotels that provide

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defense"); *In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 166-67 (2d Cir. 1987) (noting that a defense was "common to all of the plaintiffs' cases, and thus satisfies the commonality requirement of Rule 23(a)(2)"); *see also Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 490 (E.D. Cal. 2006) (noting in Rule 23(b)(3) analysis that "[w]here a central common defense may bar each of plaintiff's claims, class action treatment is particularly apt").

transportation.[19] HPT does not dispute the substance of this evidence – for example, by arguing that none or only a small percentage of its hotels is subject to the accessible transportation requirements or is noncompliant. Rather, it moves to strike Dr. Quinn's report, which is admissible, as explained in Plaintiffs' opposition to HPT's motion to strike. HPT also asserts that, even if Plaintiffs' evidence is admissible, it falls short of the policy of discrimination in *Teamsters v. United States*, 431 U.S. 324 (1977), because Plaintiffs did not submit statistical evidence and anecdotes of class members who "recounted specific instances of discrimination" other than the Representative Plaintiffs. Opp. 25-26. Nothing in *Dukes* requires a plaintiff to use a particular method to satisfy Rule 23(a)(2). Rather, "in all class actions, commonality cannot be determined without a precise understanding of the nature of the underlying claims." *Parsons*, 754 F.3d at 676; *Hernandez*, 305 F.R.D. at 153 (noting that "commonality may be determined based on substantive law and an understanding of the nature and merit of the underlying claims") (footnotes omitted). While statistical and anecdotal evidence demonstrate a policy of discrimination in employment cases, which focus on "the reason for a particular employment decision," *Dukes*, 131 S. Ct. at 2552, the Representative Plaintiffs do not need to show a discriminatory reason, or any reason, why each of HPT's hotels lacks equivalent accessible transportation. Rather, Plaintiffs have shown that violations of the ADA's accessible transportation requirements are systemwide: violations *are happening* at more than 90% of HPT's hotels. This is more than enough to show a systemwide policy or practice of discrimination.[20]

Second, that the transportation at each of HPT's hotels may be noncompliant in different ways does not undermine commonality. Opp. 25. Courts routinely reject the same argument HPT

[19] It is "incorrect" to "equate a 'rigorous analysis' with an in-depth examination of the underlying merits." *Ellis*, 657 F.3d at 983 n.8. "The district court is required to examine the merits of the underlying claim in this context, only inasmuch as it must determine whether common questions exist; not to determine whether class members could actually prevail on the merits of their claims." *Id.*

[20] HPT also cites a case finding "significant proof" of commonality lacking where one question in a script read to consumers was allegedly misleading. Opp. 26 (citing *Dominic Corea LP v. ILD Telecomms., Inc.*, No. CV 09-7433-GHK CWX, 2013 WL 821193 (C.D. Cal. Jan. 23, 2013)). The court "reject[ed] Plaintiff's flawed premise that we may artificially isolate a single question from a script" because the script must be viewed as a whole. *Id.* at *3-4. The amount of "proof" for commonality in an unfair business practices case about phone scripts is irrelevant.

makes here in analyzing commonality under Rule 23(a)(2) (and the propriety of certification under Rule 23(b)(2)). *See, e.g.*, *Gray*, 279 F.R.D. at 510; *CDR*, 249 F.R.D. at 343-45; *see also Armstrong*, 275 F.3d at 868 (rejecting argument that "a wide variation in the nature of the particular class members' disabilities precludes a finding of commonality" and holding that "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members"); *Hernandez*, 305 F.R.D. at 155 (in commonality analysis, rejecting argument that determining whether defendant had acted with deliberate indifference to prisoners' medical needs would require "distinct legal questions, burdens of proof, and 'mini-trials' for each plaintiff").

Finally, HPT's attempts to distinguish *Parsons* and *Holmes v. Godinez*, No. 11 C 2961, 2015 WL 5920750 (N.D. Ill. Oct. 8, 2015), are unavailing. These cases support the proposition that HPT's failure to put in place practices or policies to ensure compliance with the law creates an issue common to the class. HPT asserts that *Parsons* and *Holmes* had "*specific common policies and practices that affected the whole class . . .* not the mere failure to put in place such policies." Opp. 26-27. For purposes of commonality, it does not matter whether a defendant has some written policies or practices that are deficient, or no policy or practice at all to ensure compliance with the law, as is the case here. Both *Parsons* and *Holmes* challenged the defendants' failures to act or implement proper policies. In *Holmes*, the court found commonality satisfied where there were numerous claims not based on the defendant's written policies, but the "failure to implement, and ensure the consistent application of, an adequate institutional policy . . . ." 2015 WL 5920750, at *32. Similarly, in *Parsons*, many of the common policies and practices identified were based on a failure to act, for example, failing to hire enough doctors and failing to fill prescriptions. 754 F.3d at 689, 683-84.

HPT attempts to discount its "mere failure" to implement policies to comply with the law, but "injuries can stem from a failure to take action as well as from affirmative conduct." *Armstrong*, 275 F.3d at 863. HPT's failure to act on grounds generally applicable to the class is exactly what Rule 23(b)(2) contemplates, and a lack of uniform policy to comply with the law

supports commonality under Rule 23(a). A "mere failure" to implement policies is subject to the same liability under the ADA as the implementation of affirmatively illegal policies.

In sum, the Representative Plaintiffs have easily satisfied Rule 23(a)(2) by showing the existence of numerous common questions as well as "significant proof" of classwide violations.

3. The Representative Plaintiffs Satisfy Rule 23(a)(3)'s Typicality Requirement.

The Ninth Circuit has explained that "[t]ypicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Parsons*, 754 F.3d at 685 (citation omitted). In particular, "[d]iffering factual scenarios resulting in a claim of the same nature as other class members does not defeat typicality." *Ellis*, 657 F.3d at 985 n.9. HPT argues that the Representative Plaintiffs' claims are not "typical" because: (1) they did not stay at HPT hotels; and (2) the transportation services at the hotels they called were inequivalent in different ways. Opp. 27-28. HPT's arguments are without merit. "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

That the Representative Plaintiffs were deterred from visiting HPT hotels due to inaccessible transportation does not defeat typicality. The potential class includes people deterred from visiting HPT hotels.[21] Vigorous prosecution of the Representative Plaintiffs' claims – which seek an injunction that will ensure ADA-complaint transportation services at HPT's hotels – will benefit the class members regardless of whether those class members stayed at, or were deterred from staying at, HPT hotels. *See, e.g.*, *Hernandez*, 305 F.R.D. at 160 (noting in typicality analysis that "[r]elief for one individual would provide relief to everyone") (citation omitted); *see also* Tashima & Wagstaffe, Rutter Group Cal. Prac. Guide Fed. Civ. Pro. Before Trial § 10:286 (2015)

[21] As noted above, Plaintiffs' discovery responses identify another potential class member who, during the class period, was deterred from traveling to the San Francisco Bay Area on two occasions after she had called HPT hotels and learned that they did not provide transportation to guests who use wheelchairs. *See supra* p. 3.

(noting that "if the claims of the representative and the members of the class are typical, this vigorous prosecution will inure to the benefit of the class members").

Second, that the Representative Plaintiffs learned of different types of inequivalence in the transportation services at HPT's hotels does not undermine typicality.[22] *Parsons*, 754 F.3d at 685; *Ellis*, 657 F.3d at 985 n.9. The Representative Plaintiffs' claims are the same as those of absent class members: the transportation services for guests who use wheelchairs at HPT hotels do not comply with the ADA. Courts have rejected the arguments HPT makes here. *See, e.g.*, *Gray*, 279 F.R.D. at 510; *Hernandez*, 305 F.R.D. at 159 (rejecting argument that plaintiffs' different health grievances required "individual, unique responses and assessments of specific inquiries on an individual level" such that typicality could not be satisfied).

4. HPT's Ascertainability Arguments Are Without Merit.

All the authorities HPT cites on ascertainability, and the weight of authority in this Circuit, acknowledge that ascertainability is not a requirement for classes seeking certification under Rule 23(b)(2) only. HPT cites *In re Yahoo Mail Litigation*, 308 F.R.D. 577 (N.D. Cal. 2015), which states that although "the Ninth Circuit has not expressly addressed the issue of whether the judicially implied ascertainability requirement applies when a plaintiff moves to certify a class only under Rule 23(b)(2). . . . every other circuit to address the issue has concluded that the ascertainability requirement does not apply to Rule 23(b)(2) classes." 308 F.R.D. at 597 (citing cases). HPT cites no cases holding otherwise.[23]

All that is required, then, is a clear class definition. *Yahoo* found sufficient "all persons in the United States who are not Yahoo Mail subscribers and who have sent emails to or received emails from a Yahoo Mail subscriber from October 2, 2011 to the present, or who will send

[22] While HPT's evidentiary objections should be overruled, it is improper for HPT to rely on the same portions of the declarations of Ms. Goldkorn and Ms. Cupolo Freeman to which it objects. *See* Opp. 27, 30.

[23] HPT does not challenge the representative parties' adequacy under Rule 23(a)(4), but it attempts to introduce these issues through the back door of ascertainability, implying that because CREEC and CREEC members are plaintiffs, and CREEC is one of the proposed class counsel, they represent a "narrow segment" of the class and therefore notice may be necessary to "protect" the class. Opp. 28-29. Nothing in any ascertainability requirement supports HPT's argument. HPT identifies nothing about the Representative Plaintiffs or CREEC indicating they represent a "narrow segment" of the class. All share the goal of bringing HPT into compliance with the law.

emails to or receive emails from a Yahoo Mail subscriber in the future." 308 F.R.D. at 598. Plaintiffs' proposed class definition here is at least as clear, if not more: it states which individuals are in the class, on the basis of where they have stayed or have been deterred from staying. Indeed, even where ascertainability *is* required, a class is not unascertainable simply because the definition "may include individuals who did not perceive that they were short changed by [the defendants' actions], individuals who do not wish to pursue action, and individuals that have inadequate proof to go forward with the class." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-M-1827 SI, 2012 WL 253298, at *3 (N.D. Cal. Jan. 26, 2012) (cited in *Rodman v. Safeway, Inc.*, No. 11-CV-03003-JST, 2014 WL 988992, at *16 (N.D. Cal. Mar. 10, 2014)). Numerous courts have held that a class can be certified even if its membership is unclear or overbroad. *Id.*

IV. CONCLUSION

For the reasons above and in the opening brief, Representative Plaintiffs respectfully request that the Court grant their motion for class certification.

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Respectfully Submitted,

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